No. 79-1356

In the Supreme Court of the United States

OCTOBER TERM, 1979

KATHY SUE JOHNSON, etc. et al., and DARCEL MILTON, etc. et al.,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,

Respondents.

On Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

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BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

1. Is the deliberate exclusion solely on account of race of over 1630 black children and not a single white child from two Chicago public high schools in a three year period rendered lawful by a school board's stated purpose of preventing white flight in a racially changing neighborhood?

2. Is such an exclusion permissible where the excluded black children cannot obtain an integrated education except by being bused 1½ hours each way to an alternative school and where most of such children in fact attend segregated schools?

3. Does a school board's asserted purpose of preventing two schools from becoming predominantly black preclude strict judicial scrutiny of its actual motives where the board has consistently failed to adopt less discriminatory alternatives which equalize the burdens between blacks and whites?

4. Does the Board's stated purpose justify an explicit racial classification which places the entire burden of the Board's policy on black children alone?

LIST OF PARTIES

Plaintiffs (various children in the Morgan Park and Gage Park areas by their parent or guardian): Kathy Sue Johnson, by Shelby Johnson; Lynne M. Stevenson and James Stevenson, by Charles E. James; Karla Evans by Annie Evans; Linda A. Green by Reginald S. Green; Yrhonda T. Hawkins, by Joseph Hawkins; Gregory D. Robinson and Dereen R. Herron, by Anita Robinson Herron; Tammie I. Hickey, by Ben W. Hickey; Kimberly Ann Johnson, by Brenda M. Johnson; Tobbie L. McCline, by Franklin L. Jones; James E. Martin, Jr., by Mary Martin; Madge Mathews, by Lillie M. Mathews; Donnell Traylor, by Anita Traylor; Darcel

Milton, by Reverend Frank E. Milton; Sherry Rhodes, by Betty J. Allen; Edward Banks and Torrence Banks, by LaVolia Banks; Gwendolyn Brown and Yvonne Brown, by Florence Jackson; Renard Cleggett and Retunja Cleggett, by Louise Cleggett; Will A. Collins, by Hattie Collins; April Dotson, Hope Dotson and Cleon Dotson, by Sallie Dotson; Phyllis Graham, by Florence Graham; Charlotte Jackson, by Frank Jackson; Dorothy Ann Laseter, by Windell Laseter, Sr.; Earl D. Liggins, by Annie Hammond; Andrienne R. Reed and Joy Marcia Reed by Dorothy Kingsley; Lonnetta Manuel and Regina Manuel, by Lonnetta Manuel; Sarah McNuckle, by Elma McNuckle; Melvin Parker, by Murtis Parker; James Pigue, by Frankie Pigue; Olivia Riggins and Judy Riggins, by Virdie Riggins; Bernard Robinson and LaWanda Scott, by Yvonne Robinson; Judy Strong, by David Strong; Lori Waller and Eric Waller, by Ethea Waller; Timothy Christmas, by Cora Watson; Felicia Nickols, by Barbara A. Nickols; Regina Ausley, by Corrie Ausley; Demetria Baker, by Dora Baker; Adrienne Michele Clayton, by Christine Clayton; Hazel C. Faulkner, by Minnie Faulkner; Gueterris Johnson, by Eldora Johnson; Rochelle Knight, by Dorothy Knight; Gail McLaurin, by Bernice McLaurin; Teresa Mumphus, by Dorothy Mumphus; Donnell Robison, by Bessie Baker; Antoine Nelson, by Ruth Nelson; Derrick Shelton, by Charles Shelton; Ruby Lynette Turner, by William Turner; Leonita Renee White, by Lolita R. White; Cynthia Wilkins, by Bernice Wilkins; Stephan Williams and Veronica Williams, by Theressa Williams; Bryce Wormley and Sharon Bell, by Carole Wormley; Delaine Ellens, by Arthur W. Ellens; Rose S. Myatt, by Velma Myatt; Janelle Parker, by Lincoln B. Parker; and Sylvia L. Westbrook, by John L. Westbrook.

Defendants: Board of Education of the City of Chicago; John D. Carey, Mrs. Carey B. Preston, Edgar G. Epps, Bernard S. Friedman, Mrs. Louis A. Malis, Henry W. McGee, Thomas J. Naydar, Mrs. William L. Rohter, Gerald L. Sbarbaro, Mrs. Carmen Velasquez and Mrs. W. Lydon Wild, individual members of the Board of Education of the City of Chicago, and Joseph P. Hannon, General Superintendent of Schools.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 604 F.2d 504, and the unreported findings of fact and conclusions of law of the District Court, are reproduced in the Appendix to the Petition for Certiorari.

JURISDICTION

The judgment of the Court of Appeals was entered on August 13, 1979. A timely petition for rehearing and rehearing *en banc* was denied on December 6, 1979, and a petition for *certiorari* was filed within 90 days of that date. *Certiorari* was granted on July 2, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment XIV, Section 1:

> "... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. §1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

20 U.S.C. §1703(c):

> "No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by—
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> • • •
>
> "(c) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if

the assignment results in a greater degree of segregation of students on the basis of race, color, sex, or national origin among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student;"

STATEMENT OF THE CASE

The Background of the Quota Plans

Public schools in the City of Chicago are generally organized on a neighborhood school basis, and exhibit a pattern of substantial segregation. In 1976, for example, 85% of black and Hispanic high school students attended schools that were more than 85% minority (Pl. Ex. 2). The school system as a whole in 1976 was 25% white (*id.*), but 79% of Chicago's public elementary schools and 67% of its public high schools had student bodies which were more than 85% majority or 85% minority. (*Id.*) Despite considerable pressure from the Illinois State Board of Education to eliminate segregation under Ill. Rev. Stat., ch. 122, §10-21.3, the Chicago Board has refused to adopt any mandatory measures to desegregate. As a result of alleged segregation in the Chicago public schools, the Department of Health, Education and Welfare on April 9, 1979, sent the Chicago Board a notice of ineligibility for funds under 20 U.S.C. §§3191-3207 and 42 U.S.C. §2000d, and on April 21, 1980, the Department of Justice notified the Chicago Board of its intent to file suit.*

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* These facts are common knowledge in Illinois, and some of them are also specifically reflected in the Chicago Board's Report, *Access to Excellence, Recommendations for Equalizing Educational Opportunity*, at xv, xix, which both parties cited to the Court of Appeals.

The explicit racial quotas involved in this case were adopted at two public high schools on Chicago's far south side—Gage Park High School (5630 S. Rockville Avenue—2600 West) and Morgan Park High School (1744 W. Pryor Avenue—11200 South). The attendance areas for these schools are generally speaking located between all-minority schools to the east, and predominantly white schools to the west. (Pl. Exs. 2, 46).* Although racial quotas are employed in connection with admissions to certain special city-wide "magnet" schools, black and Hispanic children living in the Morgan Park and Gage Park areas are the only children in the entire Chicago public school system excluded from any neighborhood school because of their race. (R. 9, ¶18 at 10-11).**

The quota for Gage Park High School, adopted in May, 1975, established a 48% black, 42% white, 8% Hispanic and 2% principal's option school-wide quota for the school. (J.A. 24). Black students were thereafter admitted to Gage Park only to the extent that sufficient numbers of white students were in attendance so that the predetermined school-wide black-to-white ratio of 48% to 42% could be maintained. The Morgan Park quota, adopted in March, 1976, established a 50% black -50% white quota which was applied to each entering class. (J.A. 25). However, the Morgan Park quota admitted 350 black freshmen even if less than 350 white freshmen applied. (A. 36, ¶ 9; J.A. 25).

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* These white schools are Kelly (78.1% white in 1976), Kennedy (89% white), Bogan (97.4% white), Hubbard (93.4% white), and Curie (75.7% white) (Pl. Ex. 2).

** Unless otherwise indicated, citations to "R. ___" are to the Record in *Johnson*. Citations to "A. ____" are to the appendix to the Petition for Certiorari and citations to "J.A. ____" are to the Joint Appendix.

The quotas are separately administered to each race. The elementary school principals in the two high school attendance areas separate the names of all 8th grade students by race, and forward a list for each race to the high school. Lottery drawings for each race are held, and the students are listed in the order their names are drawn on separate lists for "W" (white), "B" (black), and "S" (Hispanic) students. (A. 37, ¶ 14; Pl. Exs. 20-30, 63-72). Students are admitted from the lottery lists, in order, until the quota for their race is filled. (A. 37, ¶ 14).

The quota levels for Gage Park were chosen at the request of a white spokesman, Edward Platkus, chairman of the Gage Park [Parents] Council ("we would be willing to settle at approximately where we are at now." Def. Ex. 35, at 29. See also *id.* at 37). And the quotas were adopted, at least in Morgan Park, over the express and determined opposition of the black community's representatives (Pl. Ex. 74 at 40-42 (opposition by Rep. Emil Jones), 44-47 (opposition by Ald. Wilson Frost)), and despite a survey showing that the vast majority of parents found all the alternative schools unacceptable. (Pl. Ex. 74 at 25; Pl. Ex. 75 at 7).

In each case, the Board's *stated* purpose for the quota was to reduce overcrowding and prevent increasingly black enrollments. (A. 36, ¶ 12). In particular, the Board contended that its quotas were necessary to prevent "white flight"—the refusal of white children to attend Morgan Park and Gage Park without the assurance of a ceiling on black admissions. (*Milton*, R.7, at 7; *Johnson*, R.9, at 5-6).* Accordingly, the quotas were specifically designed

* There was no direct testimony presented at trial about the alleged "white flight" phenomenon. For example, no expert testified that white flight had occurred or that the quotas would prevent

(footnote continued)

to exclude blacks from Morgan Park and Gage Park High Schools. As the District Court explicitly found, the quotas were intended to reduce black enrollments, and the quota levels for black students were necessarily set at a level lower than that at which blacks would have applied and would have been admitted but for the ceilings imposed on them. (A. 36, ¶ 12).

The quotas had their intended effect. In three school years, over 1630 black children were excluded, and not a single white child. (A. 47, ¶ 42). The District Court found (A. 37, ¶ 13):

> "No white student was ever denied admission as a result of the quotas instituted at Gage Park and Morgan Park High Schools, but hundreds of black and Hispanic students have been denied admission annually since the racial quotas were instituted."

The admission of every white student who sought to attend was evident as soon as the lottery drawings were held. On the post-drawing lottery lists for each race (Pl. Exs. 20-22, 24-26, 64-66; see Pl. Exs. 29-30, 71-72), a red line was drawn under the name of the last student admitted under the quota. In every case, the red line on the "W" list appeared under the last name on that list. By contrast, hundreds of names were below the red line on the "B" list for each school. (A. 37-38, ¶¶ 15-20.)

(footnote continued)

it. The statistics in evidence, however, suggest that racial change in Morgan Park and Gage Park was the product of two factors. First, there appears to have been an influx of black residents into the Gage Park and Morgan Park areas, and a corresponding increase in the absolute numbers of black students. (A. 35, ¶¶ 5-6). Second, although most of the school age children in each area were white (*id.*), the vast preponderance of blacks, but only about half of the whites, chose to attend the public schools. (Pl. Exs. 41-43).

The quota plans achieved the prescribed quota levels by excluding increasing numbers of black children each year until the established ceilings were reached. (See A. 40, ¶ 26). However, there was no evidence that the quota plans were effective in reversing the decline in white enrollments at the two schools. To the contrary, between 1975 and 1977, the white enrollment at Gage Park fell from 1034 to 881 and that at Morgan Park fell from 1262 to 1071. (Compare Pl. Ex. 1 with A. 40, ¶ 26).

At the same time, the excluded black children were effectively denied an integrated education. When the quotas were adopted, the Board announced that excluded black children could attend any one of a list of so-called "underutilized" public high schools, using public transportation. (A. 39 to A. 40, ¶ 24). The only underutilized schools with significant white enrollments were located on the north side of Chicago, at least 11.4 miles from Gage Park and 18 miles from Morgan Park. These schools could be reached only by a complicated journey on public bus and rapid transit lines. (A. 41, ¶¶ 28-29). Thus, in the 1975-76 and 1976-77 school years, virtually all the excluded black children attended schools which were entirely or predominantly black and Hispanic, and *not a single child* attended any white school made "available" by the Board. (A. 42 to A. 44, ¶¶ 30-32).

At the time the quotas were adopted, the Board was at best indifferent as to the ability of excluded black children to obtain an integrated education elsewhere. At the hearing preceding the adoption of the Gage Park quota, there was no discussion whatsoever about whether excluded students would be able to attend an integrated school. (Def. Ex. 35). At the Board's hearings on the Morgan Park quotas, a black parent predicted that students excluded from Morgan Park High School would

be denied the opportunity to attend an integrated school (statement of Anna Thomas, Pl. Ex. 74, at 28-29)—a fact which would have been obvious to the Board had it examined the effects of the Gage Park quota, already in operation for a year. It was not until plaintiffs filed Interrogatories in this case that the Board even sought to determine whether excluded black children were attending integrated schools. (R.16, ¶1(d) at 2; R.25, Ex. 2).

Proceedings Below

Petitioners are black elementary and high school students who are adversely affected by the quotas at Morgan Park and Gage Park. They brought the action below seeking a declaratory judgment, and injunctive and other relief.

This case was presented to the trial judge entirely on a documentary record. No Board representative testified as to the rationale for the quotas, and no demographer testified as to either past patterns or future projections of racial change. The documentary evidence as to patterns of racial change was sketchy and equivocal. For example, the Board sought to establish the need for the quotas by comparing statistics showing past racial change in Gage Park and Morgan Park with statistics showing rapid racial change in certain other neighborhoods, like the Fenger, Orr, and Bowen high school attendance areas (*e.g.*, A. 21). But the Record equally contains evidence of schools like Kenwood which from 1970 to 1976 remained constant at 26% white (Pl. Ex. 2, 50), and absolutely no explanation of Record of why Gage Park or Morgan Park were more like Fenger, Orr or Bowen than Kenwood. And the statistics of Record as to past racial change cannot be evaluated meaningfully because they are nowhere explained in the context of overall enrollment patterns in Chicago, in which the overall white school enrollment dropped from 34.6% to 24.9% white from 1970-76 (*Id.*).

The evidence also casts doubt on the potential efficacy of the quotas. For example, even high white attendance levels do not prevent racial change, for Kelvyn Park dropped from 84.8% white to 58.2% white between 1970 and 1976. (*Id.*). The overall rationality of the quota plans is also brought into question by the evidence that some schools made available to excluded black students *themselves* exhibited rapid racial change during this period (Lakeview went from 64.2% white in 1970 to 43.6% white in 1976 and Senn, from 61.5% white to 44.0% white, Pl. Ex. 2, 50)—but there is no explanation why a Board purportedly intending to prevent racial change chose to bus excluded black students to such schools. In short, on the critical points of the need for the quotas, their rationality, and anticipated efficacy, there was little more in the record than the *ipse dixit* of the Board.

After both sides presented their evidence and rested, the District Court announced that it was prepared to find the quota plans unconstitutional, but would reserve ruling to allow the Board to consider modifications to the quota plans. The Board thereupon offered excluded black children free bus transportation to various schools including some predominantly white or integrated schools principally on the Chicago's north side. This involved a 1½ hour bus trip each way. (Doc. Incorp. by Order, R.71, Beverly Review, September 14, 1977).* In the 1977-78 school year, only 102 of the 1632 excluded children availed themselves of that option (A. 47, ¶ 42). The following year, after the exclusion of several hundred additional black children, the Board reported that 359 students were participating in

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* The Board also amended its modified plan in certain minor respects (relating to publicity, student counseling, etc.) as a consequence of suggestions made by petitioners in the District Court. (Doc. Incorp. by Order, R. 71, Letter of July 22, 1977; Tr. August 5, 1977, J.A. 31-38)

its busing program (A. 14). Recent reports by the Board for the 1979-80 school year indicate that after still another year of exclusion, the number of black children availing themselves of the Board's busing option has dropped to 285. (Chicago Board of Education, "Access to Excellence, Summary of Continuing Programs," Jan. 31, 1980, at 5).

In revising its quota plans, the Board failed to adopt alternatives less burdensome on blacks. Plaintiffs, in fact, suggested a number of such alternatives, including a broader desegregation plan, efforts to integrate the predominantly white schools nearer to Morgan Park and Gage Park, and a plan involving the pairing of Gage Park and Curie, an *underutilized* school less than 2 miles away which was 76% white. (Doc. Incorp. by Order, R. 71, Letter of July 22, 1977). The sole reason the Board rejected the pairing proposal was that it would discomfit whites living in the Curie area. As the Board's counsel put it, Curie was located in Marquette Park (an area that had witnessed racial disturbances by whites protesting against an influx of minorities), so that a pairing program involving "a large influx of minority students" allegedly "would be educationally disruptive." (Tr., August 5, 1977, at 7-10, J.A. 36).

The District Court held that although the original quota plans were unconstitutional, the modifications adopted by the Board following submission of the case to the Court cured any Constitutional defects. (A. 48, ¶¶ 3, 5).* The Court of Appeals affirmed in all respects. The petition for *certiorari* was granted on July 2, 1980.

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* The District Court also found that these modifications to the quota plan which were incorporated in the District Court's final order "would not have been adopted but for the efforts of plaintiffs and their counsel" (A. 48 to A. 49, ¶ 6). Nevertheless, the District Court, while awarding costs to plaintiffs, denied their request for attorneys fees under 20 U.S.C. §1617 and 42 U.S.C. §1988, prin-

(footnote continued)

SUMMARY OF ARGUMENT

At the outset, it is important to note what this case does *not* involve.

Petitioners do not contend that school children have an absolute right to attend a neighborhood school. Nor do they urge that a school board which treats the races equitably may not take race into account in school assignments as part of an effort to desegregate its school system. There is also no objection to true "affirmative action" quotas which limit opportunities for some whites to benefit blacks, as part of an effort to overcome the effects of past racial discrimination.

What this case does involve is the right of black children to equality of treatment with white children. Once the Board of Education has decided to afford its pupils the advantages of neighborhood schools, it cannot single out black children and deny them this benefit because of their race. Black children in Morgan Park and Gage Park are suffering the effects of a dual discrimination—they alone are singled out, stigmatized, and excluded by a racial quota plan, and they alone are forced to bear tangible burdens of exclusion and travel to distant schools.

Although the Board seeks to portray its motives as benign, this is not a true "affirmative action" case. The sole victims are blacks—the traditional victims of discrimination—and the program's *de jure* discrimination

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(footnote continued)

cipally on the ground—not even defended by the Board on appeal—that plaintiffs' counsel was not entitled to fees because it accepted the case on a *pro bono publico* basis through the Chicago Lawyers Committee for Civil Rights under Law (Tr., Jan. 13, 1978). The District Court also expressed "doubts" whether plaintiffs "prevailed" within the meaning of the attorneys fee statute, because they continued to urge that the plans were unconstitutional even after the Board modified them. (Tr., Jan. 13, 1978).

against blacks is not intended to cure past discrimination. In fact, on the Board's own rationale the quotas are designed to prevent "white flight," which results, if at all, from white prejudice against attending school with large numbers of blacks. The Board's concession to this white prejudice is to inflict deprivations upon black children. Such a rationale cannot justify racial quotas disadvantaging blacks. And this is particularly true where the Board's quotas have been unsuccessful in achieving their purported integrative purpose. The feared decline in white enrollments has not been halted, and the vast majority of excluded black children attend segregated black schools.

Nor is there any justification for the independent discrimination of imposing the entire burden of achieving the Board's objectives on black children. A failure to distribute the burdens of integration equitably among the races is an independent violation of the Fourteenth Amendment. Not only has the Board failed to devise an equitable program, but it has refused to adopt the less discriminatory and potentially more integrative alternative involving Gage Park and Curie High Schools, for the sole reason that it would be opposed by the white residents of the Curie area.

Indeed, when the facts are analyzed, it is obvious that the quotas were designed to benefit whites and whites alone. For example, until this suit was brought, the Board did not even consider whether excluded black children would attend integrated schools. Rather, the evidence suggests that the Board was seeking to preserve Morgan Park and Gage Park for the white community and to establish those neighborhoods as buffer zones between the black inner city and the predominantly white neighborhoods to the west. In short, the Record utterly fails to establish the compelling state interest necessary to support a racial classification disadvantaging blacks.

ARGUMENT

1. Introduction.

At issue in this case is the legality of explicit racial quotas allegedly designed to maintain two public high schools as disproportionately white in a generally segregated and predominantly minority school system, where the entire burden of attaining the Board's objectives is imposed exclusively on blacks and none is placed on whites.

The racial discrimination in this case has two distinct aspects. The first inheres in the operation of the racial quotas themselves as a ceiling on black enrollments. Children who would normally attend Morgan Park and Gage Park High Schools are separated according to race, and each race is subject to a separate lottery in which every white child is admitted and hundreds of black children annually are excluded. It is difficult to imagine a more explicit discrimination against black children on the basis of their race.

There is, however, another aspect of the racial discrimination, which relates to the burdens which the Board of Education has imposed exclusively on black children. Although professing to seek racial balance, the Board took no steps, either in these neighborhoods or elsewhere in its highly segregated school system, to achieve integration in a manner which would place comparable burdens on white children. Thus, excluded black children are subject to unequal treatment not only compared with their white neighbors—each of whom is allowed to attend Morgan Park and Gage Park High Schools—they are also subject to discrimination compared with all other white children in the Chicago public school system, none of whom

is excluded from his neighborhood school or made to suffer any other burden under the rubric of "integration."

This dual discrimination results in tangible deprivations to black children in Morgan Park and Gage Park. Every black child is told that he, unlike his white classmates, is unwanted in his neighborhood school because of his race. As this Court noted in *Brown* v. *Board of Education,* 347 U.S. 483, 494 (1954), "To separate [school children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." This distinction between the races is not done subtly, such as by race-conscious drawing of boundary lines. Rather, it is achieved through a blatant separation of children by race and the holding of separate lottery drawings for whites and blacks. The negative psychological effect on black children—whether or not excluded—is thus maximized.

Blacks actually excluded from Morgan Park and Gage Park are further disadvantaged by being deprived of the many benefits which a neighborhood school can provide and which the Chicago Board, by organizing schools on a neighborhood basis, has decided that its school children should enjoy. *See Keyes* v. *School District No. 1,* 413 U.S. 189, 245-48 (1973) (Powell, J.). "Any child . . . who is compelled to leave his neighborhood and spend significant time each day being transported to a distant school suffers an impairment of his liberty and his privacy." *Id.* at 247-48. The travel burden is particularly onerous for the excluded black children who desire an integrated education and must travel 1½ hours each way to and from the city's north side. Excluded children lose the sense of community a neighborhood school can provide, *id.,*

and their participation in after-school activities and their parents' involvement and influence in school affairs is severely hampered, if not eliminated. No white child in Morgan Park, Gage Park, or elsewhere in the City of Chicago is subject to these disabilities. The point is not that petitioners have an absolute Constitutional right to attend their neighborhood schools, or that neighborhood schools are essential for public education. Rather, petitioners' right is to equality of treatment: where the benefits of a neighborhood school are afforded to whites, they may not be denied to blacks because of their race.*

2. The applicable legal standards require that the quotas be invalidated.

For a quarter of a century racial classifications adversely affecting minorities have been uniformly struck

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* Petitioners also do not contend that a school board is prohibited from taking race into account in school assignments as part of an effort to desegregate its school system. First, the quotas here are not part of a widespread desegregation effort. Rather, they apply to only two schools in a generally segregated system, which itself raises the danger that the selection of narrow objectives was itself racially discriminatory. See pp. 26-27 *infra*. Desegregation of an entire system, by contrast, tends to provide widespread and more evenhanded benefits, and thus has greater Constitutional significance in any balancing test. Moreover, the only persons adversely affected by the quotas here are blacks, the traditional victims of discrimination, and the Board has refused to place any burdens on whites, anywhere in Chicago, for the purposes of integration. See pp. 26-27, 29-32 *infra*. The resulting defect of these quotas is not that they take race into account, without more, but that they afford blacks unequal and inferior treatment. Where a system-wide desegregation effort distributes burdens equitably between the races, however, blacks and whites are treated equally, so there is no equal protection violation. In the absence of such a violation, there would be no basis for invalidating a desegregation program.

down by this Court. *E.g., Brown* v. *Board of Education,* 347 U.S. 483 (1954); *Loving* v. *Virginia,* 388 U.S. 1 (1967). The principle of equality which invalidates such classifications stands high in the Constitutional hierarchy. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded in the doctrine of equality." *Hirabayashi* v. *United States,* 320 U.S. 81, 100 (1943), *quoted* in *Loving* v. *Virginia,* 388 U.S. 1, 11 (1967).

The established legal standard for evaluating racial classifications which disadvantage blacks is the exacting "strict scrutiny/compelling state interest" test. Racial classifications are "constitutionally suspect," *Bolling* v. *Sharpe,* 347 U.S. 497, 499 (1954) and in scrutinizing them, courts must abandon the deference to legislative judgments characteristic of traditional standards of review, *McLaughlin* v. *Florida,* 379 U.S. 184, 192-93 (1964), apply the "most rigid scrutiny," *Korematsu* v. *United States,* 323 U.S. 214, 216 (1944) and demand a "very heavy burden of justification," *Loving* v. *Virginia,* 388 U.S. 1, 9 (1967). The burden of satifying this test is so heavy that no classification disadvantaging minorities has been upheld by this Court since the wartime Japanese curfew and eviction cases, *Hirabayashi* v. *United States,* 320 U.S. 81 (1943) and *Korematsu* v. *United States,* 323 U.S. 214 (1944).* As applied to racial classifications ad-

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* "Significantly, those cases were decided not only in time of war, but in an era before the Court had held that the Due Process Clause of the Fifth Amendment imposes the same equal protection standard upon the Federal Government that the Fourteenth Amendment imposes upon the States." *Fullilove* v. *Klutznick,* 48 U.S. L.W. 4979, 5000 n.3 (S.Ct., July 2, 1980) (Stewart, J.)

versely affecting blacks, strict scrutiny has been "strict in theory, but fatal in fact." *Fullilove* v. *Klutznick,* 48 U.S.L.W. 4979, 4995 (Powell, J.), 4998 (Marshall, J.) (S.Ct., July 2, 1980).

The controversy surrounding true "affirmative action" quotas—which limit the opportunities of whites in an effort to overcome past discrimination against blacks—is entirely irrelevant to this case. Despite the Board's characterizations, this is not an "affirmative action" or benign program. Like classic anti-black discrimination, the racial quotas in this case victimize only blacks.

Whatever standards are applied to quotas which deny opportunities to some whites in order to benefit blacks, see *Fullilove* v. *Klutznick,* 48 U.S.L.W. 4979 (S.Ct., July 2, 1980), anti-black quotas stand on a different footing. One cannot ignore the history of anti-black discrimination in this country, see *University of California Regents* v. *Bakke,* 438 U.S. 265, 387-96 (1978) (Marshall, J.), or the fact that racial prejudice against minorities is still so widespread that a mass of federal and state anti-discrimination laws is thought necessary to combat it.

The special scrutiny which must be given to anti-black classifications derives from the original purpose of the equal protection clause. Although the Fourteenth Amendment was later given an expansive reading by this Court, it was adopted in the aftermath of Emancipation for the specific purpose of ensuring equal treatment for the newly-freed slave. Its "one pervading purpose" was to secure "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." *Slaughter-House Cases,* 16 Wall. 36, 71

(1873). *Accord, Palmer* v. *Thompson,* 403 U.S. 217, 220 (1971) ("Thus, the equal protection clause was principally designed to protect Negroes against discriminatory action by the States."). Since blacks were the intended beneficiaries of the Fourteenth Amendment, they surely cannot be made the victims of a racial classification merely because a school board chooses to label it benign.

Concerns of public policy compel the same conclusion. This is not a case where a political majority has disadvantaged itself to achieve a benign purpose. Rather, it has disadvantaged a political minority. See Ely, *The Constitutionality of Reverse Racial Discrimination,* 41 U.Chi. L.Rev. 723, 727 (1974) (justifying reverse discrimination because equal protection concerns are not triggered by the majority's decision to discriminate against itself); *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152-53 n.4 (1938) (equal protection clause designed to protect politically disadvantaged groups). And unlike true "affirmative action" quotas, the quotas here harm a class with the "traditional indicia of suspectness," *University of California Regents* v. *Bakke,* 438 U.S. 265, 357 (1978) (Brennan, White, Marshall and Blackmun, JJ.); they "operate[ ] to stigmatize or single out [a] discrete and insular" minority group, *id.* at 374; they relegate excluded children to other schools which, in a neighborhood school system, creates "a significant likelihood that they will be treated as second-class citizens because of their color," *id.* at 375; and they "establish a quota in the invidious sense of a ceiling on the number of minority applicants to be admitted." *Id.*

Thus, the fact that certain "affirmative action" quotas have been upheld, *e.g., Fullilove* v. *Klutznick,* 48 U.S.L.W. 4979 (S.Ct., July 2, 1980), is no basis for departing from the "fatal in fact" review of the anti-black quotas in-

volved in this case. In *Fullilove, supra,* some Justices would have found the quota unconstitutional because the equal protection clause "absolutely prohibits invidious discrimination by government." *Id.* at 4999-5002 (Stewart, J., joined by Rehnquist, J.). This case is *a fortiori.* Other Justices voted to uphold the *Fullilove* quota in part because they found the strict scrutiny test inapplicable to "racial classifications that provide benefits to minorities for the purpose of remedying the present effects of past racial discrimination." *Id.* at 4998-99 (Marshall, J., joined by Brennan and Blackmun, JJ.). But even these Justices recognized that anti-black classifications were to be overturned under traditional strict scrutiny review. "[A]ny statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program." *Id.* at 4998. Thus, the fact that the quotas here disadvantage blacks rather than whites is itself sufficient basis for their invalidation.

In addition, the quotas here are invalid because they do not purport to cure past discrimination. At best, they are designed to prevent a future situation which would result, if at all, from the voluntary and lawful acts of private individuals. Since the Japanese cases, this Court have never sanctioned a present discrimination against anyone—black or white—except when designed in some fashion to remedy past discrimination. *See, e.g., Fullilove* v. *Klutznick,* 48 U.S.L.W. 4979, 4988-89 (S.Ct., July 2, 1980) (Burger, C.J.) (Congressionally-mandated racial preference adversely affecting whites justified as attempt to cure the effects of past discrimination); *University of California Regents* v. *Bakke,* 438 U.S. 265, 369 (1978) (Brennan, White, Marshall and Blackmun, JJ.) (racial classifications by a state government permitted "to re-

move the disparate racial impact its actions might otherwise have and if there is reason to believe the disparate impact is itself the product of past discrimination").

Indeed, certain Justices have required an even higher standard of justification—the existence of a past Constitutional or statutory violation. *See Fullilove* v. *Klutznick, supra,* 48 U.S.L.W. at 4992 (Powell, J.) ("But this Court has never approved race-conscious remedies absent judicial, administrative, or legislative findings of constitutional or statutory violations"); *id.* at 5001 (Stewart, J.) ("And a judicial decree that imposes burdens on the basis of race can be upheld only where its sole purpose is to eradicate the actual effects of illegal race discrimination."). Imposition of a present disadvantage, particularly upon whites, to remedy the effects of past discrimination against blacks may be justified as a remedial program. But present discrimination, especially against blacks, is not justified by the possibility of future segregation which would result, if at all, from demographic changes rather than from past discrimination. *Cf. Pasadena City Board of Education* v. *Spangler,* 427 U.S. 424, 434-37 (1976). Indeed, the best that can be said for these quotas is that they seek to prevent the effects of racial discrimination by whites, who would refuse to attend school with large numbers of blacks. The only ones who bear the burden of this discrimination, however, are black children. Such a program can scarcely be justified as remedial.

3. The Board's rationale for the quotas does not support racial discrimination against blacks.

In defending the exclusion of blacks because of their race, the Board of Education advances its stated purpose of "stabilizing" school enrollments in racially-changing neighborhoods. Assuming *arguendo* that this stated pur-

pose were both genuine and factually supported, it does not justify quotas that discriminate against blacks.*

First, the *very purpose* of the one-sided racial quotas in this case "is to assure within [a] student body some specified percentage of a particular group merely because of its race." *University of Cailfornia Regents* v. *Bakke,* 438 U.S. 265, 307 (1978) (Powell, J.). Such quotas are "discrimination for its own sake" and "facially invalid." *Id.*

In addition, the Board's effort to justify discrimination against black children by using the rhetoric of "integration" is misplaced. It was the very purpose of *Brown* v. *Board of Education,* 347 U.S. 483 (1954) to eliminate *de jure* segregation because its existence, *ipso facto,* was deemed to be a stigma of inferiority. Here, the Board reintroduces just such a stigma by adopting explicit *de jure* quotas under the rubric of preventing *de facto* racial separation. In effect, the Board is allowing the tail to wag the dog. *De facto* racial separation is not Constitutionally forbidden, *Keyes* v. *School District No. 1,* 413 U.S. 189 (1973), and thus can hardly justify "compellingly" the use of *de jure* programs which stigmatize blacks as requiring treatment separate from—even if equal to—that accorded whites. Analogously, in *Linmark Associates, Inc.* v. *Willingboro,* 431 U.S. 85, 96-97 (1977), this Court held that preventing *de facto* segregation did not justify infringement of First Amendment rights. Even if *bona fide,* such a purpose *a fortiori* cannot justify an impairment of black children's rights to equality under the Fourteenth Amendment.

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* As will be noted below, pp. 24-28, *infra,* the record is bare of any justification, compelling or otherwise, for the placing of burdens exclusively on black children.

Even more important, the Board's purpose for the quotas cannot be accepted as "compelling" because it is based on racial prejudice against blacks. Even on the Board's own rationale, the quotas in Morgan Park and Gage Park are designed tc prevent "white flight." White flight, however, is merely a result of the disinclination of whites to attend school with blacks. Rather than resisting white flight, the Board is catering to white prejudice by giving whites a guaranteed ceiling on black enrollments in their neighborhood schools. Needless to say, discrimination against blacks cannot be justified as necessary to satisfy white prejudice. *E.g., Watson* v. *City of Memphis,* 373 U.S. 526, 536-38 (1963); *Taylor* v. *Louisiana,* 370 U.S. 154 (1962).*

Even where a school board seeks to cure past discrimination, the possibility of white flight is not a justification for discrimination against blacks. For example, in *United States* v. *Scotland Neck Board of Education,* 407 U.S. 484, 491 (1972), this Court rejected white flight as a justification for a school board's attempt to maintain some schools as 57% white while other schools would be 89% black. And significantly, the fact that the 57% white schools were still "integrated" made no difference to this Court's decision. See also *Monroe* v. *Board of Commissioners,*

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* Since the number of blacks admitted depends, particularly at Gage Park, on the number of whites admitted, black children are further injured by having their right to an equal educational opportunity subject to the decisions of white parents. *See, e.g., Reitman* v. *Mulkey,* 387 U.S. 369 (1967) (referendum on open housing is unlawful because it makes black rights dependent on choices made by whites); *Hunter* v. *Erickson,* 393 U.S. 385 (1969) (same); *United States* v. *School District 151,* 404 F.2d 1125, 1133 (7th Cir. 1968), *cert. denied,* 402 U.S. 943 (1971) (referendum on location of school is evidence of *de jure* segregation).

391 U.S. 450, 459 (1968).* The Court of Appeals' attempt (at A. 22) to distinguish these cases as involving resistance to desegregation decrees is unpersuasive. If white flight cannot be used as a reason to avoid fully eliminating the effects of past discrimination, it surely cannot serve as a justification for new acts of racial discrimination by a school board.**

Finally, irrespective of its purpose, the discrimination against blacks is not justified because benign purposes are not in fact achieved. The quotas did not stem the exodus of whites from the two schools or stop white flight. To the contrary, from 1975 to 1977, the white enrollment at Gage Park fell from 1034 to 881 and that at Morgan Park fell from 1262 to 1071 (Compare Pl. Ex. 1 with A-40, ¶ 26). Nor did the quotas achieve any integrative purpose. As a result of the quotas, the predetermined racial make-up at each school was of course achieved. But this is not evidence of the program's success, but merely the tautological result of excluding increasing numbers of black children annually until the specified quotas are obtained. And there was no showing that in the absence of the quotas, the two schools would not have achieved a stabilized integrated enrollment like that at Kenwood

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* *Accord, United States* v. *Board of School Commissioners,* 503 F.2d 68, 80 (7th Cir. 1974); *United States* v. *Texas Education Agency,* 532 F.2d 380, 395 (5th Cir.), *vacated on other grounds,* 429 U.S. 990 (1976); *Morgan* v. *Kerrigan,* 530 F.2d 401, 419-22 (1st Cir.), *cert. denied,* 426 U.S. 935 (1976); and *Lee* v. *Macon County Board of Education,* 448 F.2d 746, 753 (5th Cir. 1971).

** The Board's rationale for the quotas is also insufficient as a compelling state interest because the Board is not attempting system-wide desegregation, but has limited its objectives to two schools in its generally segregated system. See pp. 25-27 *infra.*

High School, which from 1970-76 remained constant at 26% white (Pl. Exs. 2, 50).

Even more important, the Board has grossly misconceived the underlying philosophy of integration—a philosophy designed not to benefit "schools" but students. If large numbers of black students are deprived of an integrated education, it is of no significance that the Board can list Morgan Park and Gage Park in its statistical reports as racially "stabilized" schools. Even after the Board adopted its modified plan providing bus transportation for excluded black children, the vast majority of those children attended schools which were overwhelmingly segregated. Thus, the Board's allegedly benign theoretical justifications are malignant in practice.

For all these reasons, there is no sufficient justification for the first aspect of discrimination presented in this case—the adoption of racial quotas directed solely at blacks.

4. There is no justification for placing the entire burden on black children.

As noted above (pp. 13-14 *supra*), there is a second aspect of discrimination in this case—the entire burden of achieving integration is placed on black children. Although the Board endeavored to justify the racial quotas themselves, there was no attempt to justify the imposition of burdens exclusively on blacks.

The courts have consistently recognized that the burdens of integration must be spread equitably among the races. *E.g., Arvizu* v. *Waco Independent School District,* 495 F.2d 499, 504-07 (5th Cir. 1974) (and cases there cited) ("[I]t is incumbent upon district courts to insure that the burdens of desegregation are distributed equitably");

Clark v. *Board of Education,* 449 F.2d 493, 499 (8th Cir. 1971), *cert. denied,* 405 U.S. 936 (1972) ("the burden on all students, black and white, should be as equitable as possible"); *Lee* v. *Macon County Board of Education,* 448 F.2d 746, 753-54 (5th Cir. 1971); *Moss* v. *Stamford Board of Education,* 350 F.Supp. 879, 881-82 (D. Conn. 1972); *Brice* v. *Landis,* 314 F.Supp. 974, 976-78 (N.D. Cal. 1969). *See also Hancy* v. *County Board of Education,* 429 F.2d 364, 371-72 (8th Cir. 1970). And fear of "white flight" is not a sufficient justification for imposition of an excessive burden on blacks. *E.g., Lee, supra,* 448 F.2d at 754.

These cases recognize that the imposition of a disproportionate burden on blacks is an independent violation of the Fourteenth Amendment, even where the program is an otherwise desirable effort to eliminate segregation on a system-wide basis. Here, the relative burden on blacks is worse than disproportionate—it is exclusive. *See NAACP* v. *Lansing Board of Education,* 559 F.2d 1042, 1052 (6th Cir.), *cert. denied,* 434 U.S. 997 (1977), *aff'g* 429 F.Supp. 583, 620-21 (W.D. Mich. 1976), which held that a "one-way busing" program which transported blacks but allowed whites to remain in their neighborhood schools, "without a corresponding effort to spread the burdens of integration more equitably through the system, is an act of de jure segregation."

Here the Board is not even endeavoring to eliminate segregation on a system-wide basis. This is not a case where the Board has determined to eliminate segregation in *each* school of its system by specifying a single racial quota applicable to each school which would reflect the district-wide racial make-up. *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 16 (1971). Instead,

the Board has applied its quota to only two of 61 neighborhood high schools, and specified a racial balance which is virtually twice the 25% white enrollment of the system as a whole. (Pl. Ex. 2). To preserve some schools as 50% white in such a setting necessarily means that the remaining schools will have disproportionately high black enrollments. And the remainder of the school system, which is highly segregated (Pl. Ex. 2), is not subject to any mandatory desegregation measures. Schools which are overcrowded and predominantly white* were left as white enclaves in a school system which is predominantly black and Hispanic. Adoption of ceilings on white enrollment at such white schools would have reduced overcrowding and opened places for black students, including those excluded from Morgan Park and Gage Park, and thus promoted integration. Such ceilings could also have resulted in excluded whites attending previously minority schools. But no such ceilings have ever been adopted.

This disparate treatment of predominantly white schools is further evidence of the Board's unequal and inferior treatment of black children. The Board cannot justify its failure to integrate predominantly white schools by narrowly defining its objective of preventing segregation as limited to racially changing neighborhoods. Particularly in a school system which is overall 75% black and Hispanic, a school which is already segregated by being predominantly white is at least as much of a problem as a school which may become predominantly black if racial change continues. In each case, the integrative goal is

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* The schools, many of which are close to Morgan Park and Gage Park, include Kelly (4200 South, 2800 West) (78.1% white in 1976), Kennedy (5600 South, 6300 West) (89% white), Bogan (7900 South, 3900 West) (97.4% white), Hubbard (6200 South, 3800 West) (93.4% white), and Washington (11400 South, 3500 East) (93.3% white) (Pl. Ex. 49 and sources there cited).

the same, and it is unconstitutional to adopt quotas in one case which disadvantage blacks, but refuse to adopt quotas or other measures disadvantaging whites. *McLaughlin* v. *Florida*, 379 U.S. 184, 193-94 (1964) (where there are general evils to be corrected, the choice of piecemeal solutions may not be made on racial grounds).

Indeed, the selective imposition of quotas disadvantaging blacks to prevent racial change will have pernicious effects in Chicago, as it would in other cities with neighborhood school systems and changing neighborhoods. Schools which are predominantly white or predominantly black will be left as is, but a ceiling on black enrollments will be imposed for schools in changing neighborhoods. Such a pattern suggests a desire to preserve schools for whites, rather than achieve integration for all children. Even more important, such selective quotas will deter black efforts to migrate from the inner city ghettos to better neighborhoods with better schools. A black family's incentive to move to an integrated neighborhood will inevitably be diminished by the recognition that its children will be subject to the burdens of a school quota wherever white flight causes white enrollments to drop below the quota level. In the long run, such selective quotas may inhibit integration. And in any case, such quotas are unfair to black parents who move into a neighborhood because of its schools, and then have their children excluded on account of race.* A school board may appropriately

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* As the Court held in *Lawlor* v. *Board of Education*, 458 F.2d 660, 662 (7th Cir. 1972), *cert. denied*, 413 U.S. 921 (1973), in refusing to sanction a ceiling on black enrollments designed to prevent white flight:

> "Furthermore, the declaration sought with respect to limiting 'black students' to a 10-25% range within the O'Toole area schools would deny equal protection of the law to the black people desiring to move into the area and to their children desiring to attend the O'Toole School."

decide to impose such burdens on an equitable basis in order to achieve a *bona fide* desegregation plan. But to impose such burdens only on blacks is an equal protection violation, particularly where the Board's objectives are so selective and their benefits so questionable.

5. The evidence refutes the Board's assertion of a benign motive.

The Court of Appeals did not apply strict scrutiny to the Board's imposition of the entire burden on blacks, but instead deferred to "the discretion of local school authorities." (A. 27)* As the facts of this case demonstrate, deference to local authorities will not fully protect the Constitutional rights of blacks. In the absence of a rule of law requiring strict scrutiny and a compelling state interest justifying all aspects of an explicit racial classifica-

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* The Court of Appeals' discussion was fraught with factual and legal error. For example, it noted that "white students . . . were precluded from transferring to another school until the quota for white students had been exceeded." (A. 26). In fact, under the Board's permissive transfer program (Pl. Ex. 9), both white and black children in each school could attend any underutilized school in the city. The Court of Appeals further noted that whites would be excluded if their quota was exceeded (A. 26). This possibility is wholly theoretical; in fact, no white was ever excluded, and the quota levels for whites were set at a level higher than that at which whites were expected to attend. And in any case, a racial classification is not rendered legitimate because it might also be applied to whites. *McLaughlin* v. *Florida,* 379 U.S. 184, 192-94 (1964), *overruling Pace* v. *Alabama,* 106 U.S. 583 (1883); *Loving* v. *Virginia,* 388 U.S. 1, 10-11 (1967) (same). The Court of Appeals concludes by noting that more blacks than whites were admitted to each school (A. 26 to A. 27), but this point is legally irrelevant. The Constitutional deprivation lies in the exclusion of an individual from the school, and only blacks were ever excluded.

tion—the reason for the program, the basis if any for restricting the scope of the problem to be solved, the effects of the program, and the specific reasons for not selecting less discriminatory alternatives—there can be no assurance that a political majority is not discriminating against a minority under the banner of a benign motive. And this is particularly true where, as here, the purported benign motive of preventing segregation concededly has its origins in the racial prejudice underlying the white flight phenomenon.

Indeed, the Board's depiction of its program as a benign effort to promote integration is an exercise in creative euphemism. The evidence scarcely suggests a solicitude for the black community. On the contrary, the quotas were established over the opposition of the black community's elected representatives. (Pl. Ex. 74 at 40-42, 44-47). When the quota plans were initially adopted, black children were relegated to "underutilized" schools via public transportation. (A. 39 to A. 40, ¶ 24), and in the first year of the plan at Gage Park, black students were actually required to pay their own carefare. (Pl. Ex. 3) (J.A. 24). Virtually all the excluded children attended segregated schools, and not a single black child attended any of the "underutilized" schools which had significant white enrollments. (A. 42 to A. 44, ¶¶ 30-32). The Board, however, did not even investigate whether excluded students were obtaining an integrated education until plaintiffs served their Interrogatories (R.16, ¶ 1(d) at 2; R.25, Ex. 2). The evidence thus demonstrates that the intended beneficiaries of the racial quotas were whites, and not blacks.

In fact, the clearest evidence of the absence of benign motive is the Board's rejection of two less discriminatory alternatives. (Doc. Incorp. by Order, R.71, Letters of July 22, 1977 and August 3, 1977). Plaintiffs proposed

that Morgan Park (11200 South and 1700 West) be paired with Washington (11400 South, 3500 East) which in 1976 was 93.2% white. Using all facilities then available at those schools at 105% of capacity (the benchmark capacity figure for the Board's designation of alternative schools) would have provided an integrated education for 320 of the 390 black students excluded from Morgan Park. The Board, however, rejected the plan (*id.*, Letter of August 3, 1977, at 7) in favor of bus transportation to far more distant white schools, for the sole, scarcely compelling reason that plaintiffs' pairing plan would require continued use of mobile units (which units are widely used throughout the Chicago public school system). (See, for example, Pl. Exs. 14, 15).

Even more striking is the Board's rejection of a second plan, proposed by plaintiffs, involving Gage Park (5600 South and 2600 West) and Curie High School (4900 South and 4000 West), less than 2 miles away (Pl. Ex. 12). Plaintiffs suggested that the two schools be paired or, in the alternative, that Curie be utilized to 105% of capacity in order to accommodate black children excluded from Gage Park. At the time, Curie was at 87.7% of capacity and about 76% white, and thus could have accepted hundreds of black students without disturbing the "racial balance" allegedly sought to be maintained by the Board. Nevertheless, the Board rejected plaintiffs' proposal that Curie be used to foster integration, for the sole reason that the predominately white community in the Curie area would strenuously oppose the influx of black students. (Tr., August 5, 1977, J.A. 35-37). As defendants' counsel, Mr. Murray, stated (J.A. 35-36):

> MR. MURRAY: I have to object to that. We considered that. We have added, the plan adds 100 students to Curie High School. I think anybody who knows the city at all, and has any—
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THE COURT: You will be at something less than 90 percent of capacity.

MR. MURRAY: Yes. We believe that is educationally sound, and any more students added to Curie would be educationally disruptive of the whole program.

THE COURT: Why?

MR. MURRAY: Because a large influx of minority students, that is Marquette Park—

THE COURT: I know where it is.

MR. MURRAY: This is an area where the situation this summer is especially highly volatile.

In our best judgment no more than 100 students should be added to Curie.

As the foregoing colloquy demonstrates, the only reason the Board failed to more equitably distribute the burdens of integration between black and white students, at least insofar as Curie High School is concerned, was its greater solicitude for the prejudices of whites in Marquette Park than for the educational opportunity of black children excluded from Morgan Park and Gage Park. These facts not only emphasize the impropriety of the Board's imposition of burdens exclusively on blacks; they also undermine the Board's protestation of a benign motive for the quotas themselves. When all the facts are analyzed—the Board's initial relegation of excluded black children to underutilized schools via public transportation; its failure to investigate whether black children were obtaining an integrated education; its constant refusal to adopt mandatory measures inconveniencing whites in the name of integration; and its refusal to adopt a pairing alternative—all suggest that the Board was not concerned with providing an integrated education for black children. Rather, it sought to preserve the schools for the white community and,

perhaps even more important, to maintain Morgan Park and Gage Park as buffer zones between the black inner city and the predominantly white enclaves further to the west.

Finally, although the evidence refutes the existence of benign motive, it is not necessary for this Court to find that the Board in fact had an invidious purpose in adopting the quotas. *See University of California Regents* v. *Bakke,* 438 U.S. 265, 289 n.27 (1978) (Powell, J.). Rather, the point is that because the Board adopted a racial classification adversely affecting blacks, it had the burden of proving a benign purpose and a compelling justification. And the evidence in this case, which is entirely documentary, does not meet this burden. There is grave doubt as to both the need for the quotas, and their efficacy in achieving integration.* There was no sound explanation

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* Although the Board relied on a "white flight" theory, it did not present any experts to testify that such a theory was either valid or in any way applicable to Morgan Park and Gage Park. In fact, that theory is subject to substantial uncertainty. In *Morgan* v. *Kerrigan,* 530 F.2d 401, 420-21, n. 29 (1st Cir. 1976) the Court extensively recounted the conflicting sociological studies regarding white flight, and concluded that the white flight issue "is a matter of heated debate among experts in sociology, and a firm professional consensus has not yet emerged." *Id.* at 421, n. 29. And the *Morgan* court admitted that it lacked the expertise to resolve the question. Even where white flight has been verified, it occurs when black racial concentrations are far less than those allowed under the quota plan. *See Armstrong* v. *Brennan,* 539 F.2d 625, 629 (7th Cir. 1976), *vacated on other grounds,* 433 U.S. 672 (1977) ("Once blacks comprise about 30 percent of the population of a neighborhood or a school, 'white flight' generally begins, and whites leave in large numbers. The rate varies but the process is seldom reversed.") Thus, at best, the Morgan Park and Gage Park quotas are "too little, too late," and, as hindsight shows, unlikely to prove effective in preventing declines in white enrollment.

of either the narrow scope of the Board's purportedly benign program or why its objectives could not be achieved by less discriminatory alternatives. There is considerable inconsistency and irrationality in the quota levels selected and other aspects of the program.* And perhaps most important, there is no compelling evidence that the quotas, while portrayed as benign, were not actually intended to discriminate against blacks in order to benefit the white community. To uphold a classification discriminating against blacks on such a flimsy Record would be an invitation to further anti-black discrimination.

In short, the Board seeks to sanction explicit racial quotas disadvantaging blacks whenever the government invokes the talisman of integrative purpose. Such an approach falls far short of the "most rigid scrutiny," *Korematsu* v. *United States,* 323 U.S. 214, 216 (1944), which is necessary to vindicate the purpose of the equal protection clause to protect politically disadvantaged groups. *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152-53 n.4 (1938). And this strict scrutiny is most critical at the very point that the Court of Appeals (A. 27) was most deferential to the Chicago Board—in the choice of less discriminatory alternatives. By such deference, the Court of Appeals eliminated the core of the equal protection guarantee—the assurance that blacks will not be singled out to suffer deprivations or be denied benefits while whites are afforded preferential treatment.

The acid test is not whether a state's motive for a racial classification is laudable, but whether the state is willing to achieve its allegedly benign purposes without

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* For example, there is no explanation of why a 58%-42% minority-to-white ratio is deemed necessary to prevent white flight at Gage Park, while a 50%-50% ratio is mandated at Morgan Park. Other inconsistencies and failures of proof by the Board are set forth in the Statement of Facts. See pp. 8-9 *supra.*

inflicting burdens on blacks that it would refuse to impose on whites. All the evidence in this case suggests that the Chicago Board will not adopt any mandatory measures involving white children in the name of integration. By contrast, the Board adopted the quotas disadvantaging blacks over the protests of the black community, and without any concern—until forced to modify its plan by this litigation—for the excluded black child's opportunity to attend an integrated school. This disparate treatment of whites and blacks is the antithesis of equal protection. It would be a bitter irony if the guarantee of integration, which this Court extended to minorities in *Brown* v. *Board of Education,* 347 U.S. 483 (1954), as a promise of equality, became a justification for further discrimination.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeal should be reversed, and this case should be remanded for entry of an injunction against the quota plans and such further proceedings as may be appropriate.

Respectfully submitted,

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